count of breach of contract, were filed in the United States District Court for the Central District of California, Western Division, on December 30, 2002, just under eight years following the accrual of ABF's cause of action, in each case invoking such court's diversity jurisdiction under 28 U.S.C. § 1332.

Both Osley (App. 23) and Peters (App. 11) filed motions to dismiss under Rule 12(b)(6) on the basis that *Osley* and *Peters* were time-barred under the New York statute of limitations. In opposition to both motions, ABF argued that under controlling California precedent as enunciated by the California Supreme Court, the scope of a New York choice of law clause must be determined under New York law, and that under that law, a standard-form New York choice of law clause of the type found in both the Assumption Agreements does not encompass procedural matters, including statutes of limitations, the determination of which is left to the law of the forum state (App. 29-30 at n. 6; 17-18 at n. 5). This argument was rejected by the District Court in both cases in identical language:

> Although clever, this inference [*i.e.*, that the District Court should apply the statute of limitations law of California as the forum state] is squarely in conflict with California precedent applying New York law, including New York statutes of limitations, and is therefore rejected. See e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1237 (9th Cir. 2000) (concluding that New York's longer statute of limitation should govern a case brought in California courts because New York has the stronger interest and would suffer more damage than California if its law were not applied).

(App. 30 at n. 6; 18 at n. 5.) Applying California principles of interpretation applicable to California choice of law clauses, the District Court ruled that the New York statute of limitations should be applied, and dismissed *Osley* and *Peters* as time-barred (App. 34; 21).

In response, ABF filed motions to alter or amend judgment under Rule 59(e) (the "Rule 59(e) Motions") in *Osley* on April 25, 2003 and in *Peters* on April 24, 2003, arguing, *inter alia*, that the District Court was required, as a court exercising diversity jurisdiction, to apply California law as expounded by the California Supreme Court, which in *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 469 n. 7, 11 Cal.Rptr.2d 330, 336 n. 7 (1992) ("*Nedlloyd*"), mandated that the scope of the New York choice of law clauses in the Assumption Agreements be determined under New York law. Furthermore, the case cited by the District Court, *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000) ("*Aalmuhammed*"), neither concerned a contractual choice of law clause nor cited to any California state cases. Each of the Rule 59(e) Motions were denied by the District Court on May 15, 2003 (App. 37-39; 35-36), which stated in each case that *Aalmuhammed* "supports this general proposition [*i.e.*, that "California's choice-of-law analysis includes the chosen state's statute of limitation" (App. 38; 36)], notwithstanding the fact that Aalmuhammed did not involve a contractual choice-of-law provision" (App. 38; 36).[1] The appeals below followed (App. 1-3).

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[1] Strictly speaking, ABF agrees that, where a choice of law clause is being construed under California law, California's choice of law analysis will include a jurisdiction's statutes of limitations within the scope of a contractual choice of law clause. The whole point, however, is that it was *New York*'s law under which the choice of law clauses needed to be construed.

However, while the District Court relegated ABF's argument concerning the scope of the choice of law clauses in the Assumption Agreements to a footnote (App. 29-30 at n. 6; 17-18 at n. 5), the Ninth Circuit ignored it altogether. After finding in ABF's favor on an issue of first impression relating to the timeliness of the two appeals (App. 4-6), the opinion, stating that "the resolution of ABF's appeals is straightforward" (App. 6), noted that the District Court, having found the choice of law clauses in the Assumption Agreements enforceable (*ibid.*), "further held application of New York's statute of limitations appropriate and the parties' attempted waiver of the statute of limitations ineffective under New York law" (App. 7). The Ninth Circuit then determined that the choice of law clauses were enforceable and, without further analysis, moved on to the question of whether application of New York's statute of limitations would be contrary to a fundamental policy of California (*ibid.*), finding that it would not be (App. 7-8). That done, the dismissals of *Osley* and *Peters* were affirmed (App. 9). Not a word was addressed to the scope of the choice of law clauses in the Assumption Agreements. In this connection, it should be noted that pages 21-31 of Appellant's Opening Brief in *Osley* and pages 22-34 of Appellant's Opening Brief in *Peters* concerned this matter exclusively, and that an Appellant's Request for Judicial Notice containing eighteen cases construing applicable New York law, as well as complete copies of the briefing in *Aalmuhammed*[2], was filed in the appeal of *Osley* on January 2, 2004 and in the appeal of

[2] The briefing in *Aalmuhammed* did not touch on the issue of the scope of New York choice of law clauses or, more generally, on whether an inference that New York law is applicable properly implies that New York statutes of limitations are applicable.

Peters on March 3, 2004. By Orders filed January 12, 2004 and March 9, 2004, respectively, these requests for judicial notice were referred to the respective merits panels, but no discussion or ruling was made concerning them in the opinion (App. 1-9). Because no consideration was given in the opinion to the issue of the scope of the choice of law clauses, which was the chief substantive issue in both *Osley* and *Peters*, ABF filed a petition for rehearing in the Court of Appeals on August 2, 2005, which was denied on August 12, 2005 (App. 40).

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT

IN REFUSING TO CONSTRUE THE SCOPE OF THE CHOICE OF LAW CLAUSES IN THE ASSUMPTION AGREEMENTS UNDER NEW YORK LAW, THE NINTH CIRCUIT DISREGARDED SECTION 34 OF THE FEDERAL JUDICIARY ACT OF 1789 AS NOW CODIFIED IN 28 U.S.C. § 1652 AND EXPOUNDED BY *ERIE R. CO. V. TOMPKINS*, 304 U.S. 64, 78-80 (1938), AND HAS THEREBY SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

Ultimately, the issue faced by the District Court in both *Osley* and *Peters*, and thereafter by the Ninth Circuit in the appeals therefrom, is easy enough to formulate: does the enforceability of the New York choice of law clauses in the respective Assumption Agreements signed by the two Respondents result in application of New York's law concerning statutes of limitations? The District Court

got it wrong and the Ninth Circuit declined to answer it and, in effect, affirmed the District Court's result without analysis. In so doing, the Ninth Circuit violated one of the most basic principles of federalism, *viz.*, Section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 92, now codified as 28 U.S.C. § 1652. To see this, it is first necessary to look at California law.

In 1992, the California Supreme Court, in *Nedlloyd*, formally adopted the rules set forth in section 187 of Restatement Second Conflict of Laws (the "Restatement") in determining the enforceability of a contractual choice of law clause. 3 Cal.4th at 464-65, 11 Cal.Rptr.2d at 332-33. Under the Restatement, the law of the state so chosen will be applied unless either the chosen state lacks a "substantial relationship" to the parties or the transaction and there is no other "reasonable basis" for such choice, or application of the chosen state's law would be contrary to a fundamental policy of a state which has a materially greater interest and whose law would otherwise apply. Restatement, § 187, sub. (2); *Nedlloyd*, 3 Cal.4th at 465, 11 Cal.Rptr.2d at 333. The California Supreme Court ultimately ruled that the choice of law clause in the contract then before it, entered into by a Hong Kong corporation with three Netherlands corporations and other parties, which denoted Hong Kong law as governing the contract, was valid. 3 Cal.4th at 467, 11 Cal.Rptr.2d at 466, *et seq*. The applicable statutes of limitations were not an issue in the case.

In a subsequent decision, however, a district of the California Court of Appeal employed the *Nedlloyd* analysis to apply the statute of limitations of another state to the dispute before it. *Hambrecht & Quist Venture Partners v. American Medical Internat., Inc.*, 38 Cal.App.4th 1532, 46

Cal.Rptr.2d 33 (1995) ("*Hambrecht & Quist*") involved a leveraged buy-out in which, among other agreements, a Delaware corporation entered into an agreement with three other corporations, one of which was also incorporated in Delaware. 38 Cal.App.4th at 1536-38, 46 Cal.Rptr.2d at 35-36. In affirming the trial court's sustention of a demurrer based on the (shorter) three-year Delaware statute of limitations, the Court of Appeal first had to decide whether the Delaware choice of law clause incorporated Delaware's statutes of limitations, finding that it did. 38 Cal.App.4th at 1539-44, 46 Cal.Rptr.2d at 37-40. Next, expressly applying the framework of section 187 of the Restatement as adopted in *Nedlloyd*, the Court determined that the incorporation of two of the three contracting entities in Delaware[3] satisfied, without more, both the "substantial relationship" and "reasonable basis" tests in section 187 of the Restatement. 38 Cal.App.4th at 1544-47, 46 Cal.Rptr.2d at 40-42. Finally, noting that California permits parties both to extend and to shorten the otherwise applicable statutes of limitations (38 Cal.App.4th at 1547-48, 46 Cal.Rptr.2d at 42-43), and noting that California has no "fundamental" policy against applying another state's statutes of limitations (38 Cal.App.4th at 1548-49, 46 Cal.Rptr.2d at 43), the Court of Appeal found the Delaware choice of law clause was enforceable so as to result in the application of Delaware's statute of limitations, affirming the trial court's ruling (38 Cal.App.4th at 1549-50, 46 Cal.Rptr.2d at 44).

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[3] The state of incorporation of the third entity is not stated. *See*, 38 Cal.App.4th at 1536, 1546, 46 Cal.Rptr.2d at 35, 41.

In a vital but often overlooked refinement, however, it is explicitly stated in *Hambrecht & Quist*, quoting *Nedlloyd*, that the scope of a choice of law clause is determined by the law of the chosen jurisdiction:

> Because the choice-of-law clause states that Delaware law is to govern the construction of the August Agreement, questions concerning the scope of the clause would, in the normal course, be decided under Delaware law. (See *Nedlloyd Lines B.V.* v. *Superior Court* (1992) 3 Cal.4th 459, 469, fn. 7 [11 Cal.Rptr.2d 330, 834 P.2d 1148].) *However, the parties have not briefed the interpretation issue under Delaware law (see Evid. Code, § 453, subd. (b)), nor have they requested that we take judicial notice of Delaware law on the matter (see Evid. Code, § 452, subd. (a)). The question therefore becomes one of California law.* (*Nedlloyd Lines B.V.* v. *Superior Court*, *supra*, 3 Cal.4th at p. 469, fn. 7.)

Hambrecht & Quist, 38 Cal.App.4th at 1540, n. 5, 46 Cal.Rptr.2d at 37, n. 5; italics added.[4] This principle has been reiterated in a recent decision of the California Supreme Court. *Washington Mutual Bank v. Superior Court*, 24 Cal.4th 906, 916, n. 3, 103 Cal.Rptr.2d 320, 328, n. 3 (2001) ("*Washington Mutual*") (explaining that the scope of the choice of law provision in *Nedlloyd* was interpreted under California law because the parties in that case did not brief Hong Kong law). Under these authorities, the

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[4] It was precisely to avoid the application of California law by default that ABF briefed New York law both to the District Court and to the Ninth Circuit and filed requests for judicial notice relating thereto with both tribunals.

scope of the New York choice of law clause in the Assumption Agreements is to be construed under New York law. Under New York law, a designation of New York law by the parties to a contract is deemed *not* to include New York's statutes of limitations.

Previously, California once had the same approach, holding to the "traditional" view that the forum state applies its own procedural laws to an action regardless of where the claim arose, statutes of limitations being regarded as procedural and, therefore, determined by the law of the forum. *See, e.g., Grant v. McAuliffe*, 41 Cal.2d 859, 862, 264 P.2d 944, 948 (1953); *Biewend v. Biewend*, 17 Cal.2d 108, 114, 109 P.2d 701, 705 (1941). This view was abandoned in California in *Reich v. Purcell*, 67 Cal.2d 551, 555, 63 Cal.Rptr. 31, 34 (1967), which adopted the "governmental interest" analysis. New York, however, continues to observe the traditional rule that matters of procedure are governed by the law of the forum (*Tanges v. Heidelberg North America, Inc.*, 93 N.Y.2d 48, 53, 687 N.Y.S.2d 604, 605-06 (1999) ("*Tanges*"); *RMS Partners Tivoli Co. v. Uccellini*, 249 A.D.2d 788, 791, 671 N.Y.S.2d 853, 854-55 (1998)), and statutes of limitations are considered to be procedural in nature in New York (*Tanges*, 93 N.Y.2d at 54-55, 687 N.Y.S.2d at 607; *Martin v. Dierck Equip. Co.*, 43 N.Y.2d 583, 588, 403 N.Y.S.2d 185, 187 (1978)). The New York decisions reflect this view in two ways.

First, where no contractual choice of law clause is present, the courts of New York consistently have applied New York law concerning limitation of actions although

the substantive law of another state was deemed to apply.[6] *See, e.g., New York Life Ins. Co. v. Aitkin*, 125 N.Y. 660, 674, 26 N.E. 732, 735 (1891) (action for deficiency judgment on mortgage of land in New Jersey); *Miller v. Brenham*, 68 N.Y. 83, 87 (1877) (action on a California judgment); *Hifler v. Calmac Oil & Gas Corporation*, 258 A.D. 78, 88, 10 N.Y.S.2d 531, 544 (1939) (stockholder's derivative action on behalf of Pennsylvania corporation); *Semar v. Great Eastern Fuel Co.*, 191 Misc. 552, 553, 77 N.Y.S.2d 701, 702-03 (1948) (applying New York law to determine timeliness of filing fraud action under Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 *et seq.*, instead of Section 256 of Portal-to-Portal Act of 1947, 29 U.S.C.A. §§ 216(b), 251 *et seq.*); *United Trust Corporation v. Burgess*, 175 Misc. 511, 512, 24 N.Y.S.2d 84, 87 (1940) (action by Massachusetts payee of note payable in Massachusetts); *Anglo Calif. Nat. Bank v. Klein*, 167 Misc. 898, 905, 296 N.Y.S. 191, 200 (1936) (deficiency action against shareholder of California corporation). When the New York statute of limitations applies, all related New York law pertaining thereto applies also. *Hughes v. Hinson'sGarage, Inc.*, 9 A.D.2d 1014, 1015, 194 N.Y.S.2d 324, 326 (1959) ("It is natural and logical that the plaintiff should have the benefit of all the New York provisions on limitations, including that of tolling for infancy [citations]"); *cf., Anglo Calif. Nat. Bank v. Klein*, *supra*, 167 Misc. at 06, 296 N.Y.S. at 201-02 ("It would be manifestly unjust, therefore, to refer to the California law

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[6] Copies of all the New York state decisions cited herein were provided to the Ninth Circuit in each of the Requests for Judicial Notice referred to previously, at Exhs. "A" – "S" therein.

to determine the period of limitation and to ignore that law with respect to a waiver of the benefit of that period").

Second, where a contractual choice of law clause is present, it is well settled in New York that a choice of law clause only acts to import the substantive law of the chosen state and not procedural matters. *Sears, Roebuck & Co. v. Enco Assoc., Inc.*, 43 N.Y.2d 389, 397-98, 401 N.Y.S.2d 767, 772 (1977) (New York statute of limitations applied although contract specified Michigan law); *Gambar Enterprises v. Kelly Services*, 69 A.D.2d 297, 304, 418 N.Y.S.2d 818, 822 (1979). This aspect of New York law has been alluded to by this Court as well as by District Courts sitting in New York. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995) (New York choice of law provision does not extend to powers of arbitrators); *Cronin v. Family Educ. Co.*, 105 F.Supp.2d 136, 139 (E.D.N.Y. 2000) ("[C]ourts generally interpret New York choice of law provisions to choose only substantive law, not procedural law concerning such matters as . . . statutes of limitations . . . "); *Cafferty v. Scotti Bros. Records, Inc.*, 969 F.Supp. 193, 203 (S.D.N.Y. 1997) ("Under New York law, a choice of law clause is construed as choosing only the applicable substantive law, not the applicable limitation period"); *Insurance Co. of North America v. ABB Power Generation*, 925 F.Supp. 1053, 1059 (S.D.N.Y. 1996) ("New York courts do not apply contractual choice of law clauses when determining what statute of limitations applies").

There can be no dispute, therefore, that under New York law, the New York choice of law clauses contained in the Assumption Agreements would be deemed not to encompass the issue of the applicable statute of limitations, as to which the local law of California would apply. In like regard, the New York Appellate Division, in evaluating the validity

of a New Jersey judgment obtained on a guarantee reciting that it "shall be governed by the laws of New York," ruled that New Jersey law on procedural matters had been properly applied by the New Jersey court:

> It should first be noted that Special Term was correct using New Jersey law. *The clause in the guarantee stating that New York law should govern refers only to substantive disputes.* Procedural matters are to be governed by the law of the forum [citations]. Thus the New Jersey court properly chose to utilize its own rules governing service of process rather than those of New York.

American Nat. Bank & Trust of N.J. v. Alba, 111 A.D.2d 294, 296-297, 489 N.Y.S.2d 285, 287 (1985); italics added. Accordingly, the statutes of limitations applicable to the filing of *Osley* and *Peters* were to be provided by California law.

We now return to the issue of federalism previously alluded to. As a District Court exercising diversity jurisdiction, the trial judge was required to apply California choice of law principles as expounded by the California Supreme Court. *Abogados v. AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000). This Court previously explained the basis for this rule as follows:

> We are of opinion that the prohibition declared in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, against such independent determinations [of applicable rules of decision] by the federal courts, extends to the field of conflict of laws. . . . Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. See *Erie R. Co.* v. *Tompkins*, *supra*, at 74-77.

Klaxon Co. v. Stanton Co., 313 U.S. 487, 496 (1941). In particular, "[t]he district court . . . is bound to follow the considered dicta as well as the holdings of the California Supreme Court when applying California law." *Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1164 (9th Cir. 1995) (citation omitted). Both of the District Court's orders of dismissal took pains to note that the California Supreme Court stated in *Nedlloyd*, "'[T]he question of whether [the choice-of-law] clause is ambiguous as to its scope . . . is a question of contract interpretation that in the normal course should be determined pursuant to Hong Kong [– the chosen state –] law.'" (App. 29 at n. 6; 17 at n. 5.) As the choice of law clauses in the Assumption Agreements cited New York law as governing the contracts, under *Nedlloyd*, the District Court was required to construe the scope of those clauses under New York law, but declined to do so, citing solely to *Aalmuhammed*. (App. 30 at n. 6; 18 at n. 5). *Aalmuhammed*, however, wholly fails to support the District Court's contention.

In *Aalmuhammed*, the plaintiff was seeking, *inter alia*, compensation as an author of the motion picture *The Autobiography of Malcolm X*, and one of his claims was a *quantum meruit* claim for services performed in New York and Egypt. While one of the issues discussed by the Ninth Circuit in that case was the applicable statute of limitations, the plaintiff's claim in *Aalmuhammed* was based on an *oral* contract in which there was no contractual choice of law clause. 202 F.3d at 1236-37. Accordingly, *Aalmuhammed* used the California test applicable in the *absence* of a choice of law clause, namely, the "governmental interest" analysis, which approach the District Court had carefully distinguished, just a few pages before its citation to *Aalmuhammed*, from the test applicable when a choice of law clause is present (App. 24-25; 12-13). No California

cases are cited in *Aalmuhammed*, and the three federal cases cited in its choice of law discussion, *viz.*, *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1507 (9th Cir. 1993); *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482, 484 (9th Cir. 1987); and *Rosenthal v. Fonda*, 862 F.2d 1398, 1403 (9th Cir. 1988), likewise concerned oral agreements. *Aalmuhammed* and the District Court cited no authority whatsoever for the proposition that applying California statutes of limitations in an action concerning a contract with a New York choice of law clause is contrary to California precedent applying New York law.[6]

Whether such authority exists or not, it must be remembered that "[a] federal court applying California law must apply the law as it believes the California Supreme Court would apply it." *Gravquick A/S v. Trimble Navigation Intern. Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003) (citation omitted). Given the California Supreme Court's recent reiteration of the *Nedlloyd* rule that the scope of a choice of law clause is to be determined by the law of the chosen state – *Washington Mutual* was published after *Aalmuhammed* – a contrary previous *California* decision, even if on point, would be obsolete. Accordingly, under the principle originally enacted as Section 34 of the Federal Judiciary Act of 1789 as enunciated by *Erie R. Co. v.*

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[6] Apparently, the District Court cited *Aalmuhammed* because in applying New York "law," it applied New York's statute of limitations. In so doing, ABF submits that the decision in *Aalmuhammed* is incorrect, because, as shown by the cases cited on pp. 11-13, *supra*, even in the absence of a choice of law clause, New York applies the statute of limitations of the forum state. It is worth noting that this aspect of New York law was not briefed to the Ninth Circuit by the parties in *Aalmuhammed*. The applicable pages of the briefs are found in the Requests for Judicial Notice previously referred to, at Exh. "S," pp. 9, 13 & 26-28; Exh. "T," pp. 3 & 27-35; Exh. "U," pp. 17-22; & Exh. "V," p. 15.

Tompkins, 304 U.S. 64, 78-80 (1938) and its progeny, the "rule of decision" applicable to *Osley* and *Peters* was supplied by *Nedlloyd* and *Washington Mutual*, not *Aalmuhammed*. By failing to apply the law of California as enunciated by the California Supreme Court, the Ninth Circuit disregarded 28 U.S.C. § 1652, justifying the grant of ABF's petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate the dismissals of *Osley* and *Peters* entered below; to remand the matter to the District Court for further proceedings; or to provide Petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,

Dated: November 10, 2005

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ABF CAPITAL CORP., a Delaware Corporation, *Plaintiff-Appellant*, v. EDWARD J. OSLEY, JR. and RENEE PETERS, *Defendants-Appellees.*	No. 03-56349 D.C. No. CV-02-09909-FMC No. 03-56352 D.C. No. CV-02-09908-FMC OPINION

Appeal from the United States District Court
for the Central District of California
Florence-Marie Cooper, District Judge, Presiding

Submitted April 6, 2005*
Pasadena, California

Filed July 12, 2005

Before: Dorothy W. Nelson and Marsha S. Berzon, Circuit Judges, and James C. Mahan,** District Judge.

Opinion by Judge Mahan

COUNSEL

Brian J. Jacobs, Sherman Oaks, California, for the plaintiff-appellant.

* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

Anne F. Wickers, Pillsbury Winthrop, San Francisco, California; Edward Osley, Pro se, Sandy, Utah, for the defendants-appellees.

OPINION

MAHAN, District Judge:

Appellant ABF Capital Corp. ("ABF") has brought two appeals from two separate district court cases involving assumption agreements executed by appellees, Renee Peters (Case No. 03-56352) and Edward J. Osley (Case No. 03-56349). We address both appeals herein as they involve virtually identical facts and claims.

BACKGROUND

In December 1982, Renee Peters ("Peters") purchased six limited partnership units of the New York limited partnership, Regent Energy Partners. That same month, Edward Osley ("Osley") purchased six limited partnership units of Oak Energy Partners, also a New York limited partnership. These limited partnerships thereafter entered into several sublease agreements with ABF.

These sublease agreements provided for annual royalties to be paid to ABF, but allowed the partnerships to defer the royalty if the partners assumed personal liability for the royalty amount. Peters and Osley both executed assumption agreements wherein they assumed personal responsibility for their pro rata share of the royalties.

Two provisions of these assumption agreements are at issue here: The parties selected New York law as governing their obligations and Peters and Osley waived the benefit of any statute of limitations defense.

Roughly seven years after the royalty payments became due and payable, ABF filed complaints for breach of contract on December 30, 2002, against Peters and Osley. Peters and Osley then moved to dismiss ABF's complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) because the suits were filed after the statute of limitations expired, and for failure to join a necessary party under Federal Rules of Civil Procedure 19 and 12(b)(7).

The district court, sitting in diversity, ruled the New York choice of law clause of the assumption agreements was enforceable and that New York law barred the waiver of the statute of limitations. Concluding ABF's claims were time-barred under the New York statute of limitations, the district court dismissed ABF's claims for breach of contract with prejudice. The order granting dismissal was entered on April 10, 2003, for Peters, and on April 11, 2003, for Osley.

ABF then moved in both cases to alter or amend the judgment under Federal Rule of Civil Procedure ("Rule") 59(e). Because no judgments had yet been entered, the district court construed ABF's motions as motions for reconsideration of the order granting dismissal. The district court denied both motions by minute orders entered on May 15, 2003. On July 30, 2003, ABF filed notices of appeal in both cases.

DISCUSSION

A. Timeliness of Appeal

If an order is appealable, then notice of appeal must be filed within 30 days of entry of the judgment subject to certain exceptions. Fed. R. App. P. 4(a)(1)(A). When judgment is entered for purposes of appeal depends upon Federal Rule of Civil Procedure 58, which requires every judgment to be set forth on a separate document. Fed. R. Civ. P. 58(a)(1).

Here, the district court entered the orders granting dismissal under Rule 12(b)(6) on April 10, 2003, for Peters and on April 11, 2003, for Osley, but never entered judgment on a separate document to satisfy Civil Rule 58(a)(1). When a judgment is not set forth on a separate document, then it is deemed entered for purposes of appeal 150 days from entry on the civil docket. Fed. R. App. P. 4(a)(7)(A)(ii). The deadline for notice of appeal then runs 30 days from entry of judgment. Fed. R. App. P. 4(a)(1)(A).

Peters and Osley challenge ABF's notices of appeal as untimely under Federal Rule of Appellate Procedure ("Appellate Rule") 4. Peters and Osley do not dispute ABF filed notice of appeal within 180 days of the order dismissing ABF's complaint on July 30, 2003. Rather, Osley and Peters argue ABF's notices of appeal were untimely because the 180-day timetable was shortened after ABF prematurely moved to alter or amend judgment under Civil Rule 59(e) on April 24, 2003, which the district court denied by minute order on May 15, 2003.

Appellate Rule 4 provides that when a party timely moves to alter or amend judgment under Civil Rule 59, the time to appeal runs for all parties from entry of the order disposing of the motion. Fed. R. App. P. 4(a)(4)(A)(iv). We

have never addressed whether a premature post-judgment motion to alter or amend may accelerate an existing deadline for notice of appeal.

We do not agree with Peters and Osley that the district court's minute order denying ABF's attempted Civil Rule 59(e) motion to alter or amend shortened the deadline to appeal. The purpose of the separate document requirement is that the parties will know precisely when judgment has been entered and when they must begin preparing post-verdict motions or an appeal. *Ford v. MCI Communications Corp. Health and Welfare Plan,* 399 F.3d 1076, 1079 (9th Cir. 2005). If a premature post-judgment motion accelerated the time-line for appeal, it would violate the intent of Civil Rule 58 and Appellate Rule 4 to provide definite deadlines for appeal. *See Bankers Trust Co. v. Mallis,* 435 U.S. 381, 386 (1978) ("[The separate document] rule is designed to simplify and make certain the matter of appealability . . . The rule should be interpreted to prevent loss of the right to appeal, not to facilitate loss.") (quoting 9 J. Moore, Federal Practice § 110.08[2], 120 n. 7 (1970)).

Rule 58 and Appellate Rule 4 were recently amended "to work in conjunction" with each other. Fed. R. Civ. Proc. 58, Advisory Committee Note on 2002 Amendments. Those amendments "preserve[d]" the separate document rule for judgments such as the district court's order of dismissal. *Id.* Although exceptions to the separate document rule exist for Rule 59(e) motions, that "does not excuse the obligation to set forth the judgment on a separate document." *Id.* Moreover, while one purpose of the 2002 amendments was to assure that "appeal time does not linger on indefinitely," *id.*, nothing in the rules or the

commentaries suggests an intent to *shorten* the time for appeal if a post-judgment [*sic*] is filed.

Applying these principles to the present case "with common sense," *id.*, we conclude that the district court's minute orders on ABF's Rule 59(e) motions did not substitute for its obligation to "comply with th[e] simple obligation" of entering the judgment on a separate document. *Id.* Following the separate document rule best complies with the intent of Rule 58 and Appellate Rule 4 to provide a "clear signal" to potential appellants "that the time to appeal has begun to run." Fed. R. App. Proc. 58, Advisory Committee Note on 2002 Amendments. Judgment for purposes of Appellate Rule 4, therefore, could not have been entered until a separate document had been filed or 150 days had passed. Fed. R. Civ. Proc. 58(b)(2); Fed. R. App. Proc. 4(a)(7)(A)(ii). Until judgment was entered one of these two ways, no obligation to appeal the judgment arose. Nothing in the 2002 amendments provides otherwise, or suggests that Congress meant to require appeal of a final judgment *before* entry of judgment, because an early-filed motion questioning the announced-but-not-entered judgment had been denied.

Accordingly, we hold that a premature post-judgment motion may not accelerate the deadline for appeal before a separate judgment has been entered.

B. Choice of Law

After disposing of the initial jurisdictional question, the resolution of ABF's appeals is straightforward. Here, the district court, sitting in diversity, applied California choice of law principles to find the assumption agreements' New York choice of law clause enforceable. The district

court further held application of New York's statute of limitations appropriate and the parties' attempted waiver of the statute of limitations ineffective under New York law.

"In determining the enforceability of arm's-length contractual choice-of-law provisions, California courts shall apply the principles set forth in Restatement section 187, which reflects a strong policy favoring enforcement of such provisions." *Hambrecht & Quist Venture Partners v. Am. Med. Int'l, Inc.*, 38 Cal. App. 4th 1532, 1544 (1995) (quoting *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 465-66 (1992)). Under this approach, we must first determine (1) whether New York has a substantial relationship to the parties or the transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. *Nedlloyd*, 3 Cal. 4th at 465.

A substantial relationship exists where one of the parties is domiciled or incorporated in the chosen state. *Nedlloyd*, 3 Cal. 4th at 467. Here, the agreements were between New York limited partnerships (Regent and Oak Energy) with Peters and Osley for the benefit of a corporation with its principal place of business in New York (ABF). Further, the assumption agreements stemmed from the underlying sublease agreements, which specified New York as the place of payment. These connections sufficiently establish a substantial relationship between the parties and New York and a reasonable basis to enforce the parties' New York choice of law provisions.

We next consider whether application of New York law "is contrary to a *fundamental* policy of California." *Nedlloyd*, 3 Cal. 4th at 466 (emphasis in original). If New York law conflicts with a fundamental California policy then we

evaluate whether California has a materially greater interest than the chosen state in resolution of the issue. *Id.* at 466.

Here, the California and New York statutes of limitations governing breach of contract claims differ. New York's statute is six years, whereas California's statute of limitations is four years. N.Y. C.P.L.R. § 213 (2003); CAL. CIV. PROC. CODE § 337 (2003). More importantly, California permits waivers of the statute of limitations, while New York prohibits such waivers before accrual of the cause of action. CAL. CIV. PROC. CODE § 360.5 (2003); N.Y. GEN. OBLIG. LAW § 17-103 (2003). Thus, ABF's seven-year-old claims are timely under California law, but time-barred under New York law.

Despite this distinction between California and New York law, we agree with the district court that little if any conflict exists between application of New York law and fundamental California policy. "California courts accord contracting parties substantial freedom to modify the length of the statute of limitations." *Hambrecht,* 38 Cal. App. 4th at 1548. Further, California has "no fundamental state policy against applying a foreign jurisdiction's statutes of limitations to claims brought within California courts." *Id.* at 1548-49.

The primary policy behind California's statute of limitations is to protect California defendants and California courts from being required to litigate stale claims. *See Ashland Chemical Co. v. Provence,* 129 Cal. App. 3d 790, 794 (1982). Here, this policy is furthered by application of the New York statute of limitations, which will preserve California's interest in protecting California defendants from stale claims.

For these reasons, we hold the parties' choice of New York law enforceable. Accordingly, the parties' purported waivers of the New York statute of limitations are ineffective, and ABF's claims for breach of contract are barred by New York's six-year statute of limitations.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ABF CAPITAL CORP., a Delaware Corporation, Plaintiff, vs. RENEE PETERS, Defendant.	) CV 02-9908 FMC (AJWx))) ORDER GRANTING) DEFENDANT'S MOTION) TO DISMISS)) (Entered Apr. 10, 2003)

This matter is before the Court on the Defendant's Motion to Dismiss (Docket #5 & #6). The Court deems this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing date set for April 14, 2003, is removed from the Court's calendar. For the reasons and in the manner set forth below, the Court **hereby grants** Defendant's Motion to Dismiss.

I. Background

In December of 1982, Defendant, a California resident, purchased six (6) units of limited partnership interest in the New York limited partnership of Regent Energy Partners. The Partnership then entered into several Sublease Agreements with Plaintiff. Under the Sublease Agreements, the Partnership agreed to pay Plaintiff a minimum annual royalty, but also agreed that payment could be deferred, subject to the assumption of liabilities by each partner for his or her pro rata share of the royalties. Defendant executed an Assumption of Liabilities Agreement ("Assumption Agreement") for the express benefit of Plaintiff (Compl. at 3), agreeing to assume

personal liability for her pro rata share of the royalties. The Partnership elected to defer the minimum annual royalties. Defendant's share of the royalties then became due and payable on December 31, 1994. In her Assumption Agreement, Defendant agreed to "[waive] the benefit of the statute of limitations affecting [her] liability hereunder or the enforcement thereof . . . ," and that, "[the] Agreement is governed by and construed under the laws of the State of New York." (Compl. Ex. A ¶¶9, 12.) Plaintiff filed suit on December 30, 2002. On March 13, 2003, Defendant filed a motion to dismiss the action for failure to state a claim, under Fed. R. Civ. Proc. 12(b)(6), and failure to join a necessary party to an action, pursuant to Fed. R. Civ. Proc. 12(b)(7) and 19. The Court is persuaded by Defendant's argument that the Court should apply the New York statute of limitations for these claims. In doing so, the Court concludes that the statute of limitations has expired, and therefore these claims are dismissed with prejudice. As such, the Court does not decide the issue of joinder.

II. Dismissal Pursuant to Rule 12(b)(6)

The current Motion requires the Court to determine whether the Complaint states a claim upon which relief may be granted. *See* Fed R. Civ. P. 12(b)(6). The Court will not dismiss Plaintiff's claims for relief unless it cannot prove any set of facts in support of its claims that would entitle it to relief. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998). In limiting its inquiry to the content of the Complaint, the Court must take the allegations of material fact as true and construe them in the light most favorable to the plaintiff. *See W. Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985).

Additionally, the Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994).

III. Applicability of New York Statute of Limitations

A. Enforceability of the Choice-of-Law Provision

Generally, a district court in a diversity case must apply the same choice-of-law analysis that would be applied by state courts in the jurisdiction in which the district court is situated. *See Cleary v. News Corp.*, 30 F.3d 1255, 1265 (9th Cir. 1994) (citing *Klaxon Co. v. Stentor Elect. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Waggoner v. Snow, Becker, Kroll, Klaris & Kruass*, 991 F.2d 1501, 1506 (9th Cir. 1993)). In the absence of a contract designating the applicable governing law, California courts apply the "governmental interest" test, focusing on the governmental interest of each state involved in the litigation. *Brentwood Investors v. Wal-Mart Stores, Inc.*, 1998 WL 337968, at *7 (N.D. Cal. 1998), *aff'd*, 225 F.3d 661 (9th Cir. 2000) (citations omitted) (stating that under the governmental interest [*sic*], California law is applied unless (1) the foreign law conflicts with California law, (2) both jurisdictions have significant interests in having their law applied, and (3) the foreign jurisdiction's policy interests would be more impaired if its laws were not applied); *Hurtado v. Superior Court*, 11 Cal. 3d 574 (1974). Conversely, if a contract contains a choice-of-law provision, that provision controls under California law. *Brentwood Investors*, 1998 WL

337968, at *7 (citing *Nedloyd Lines, B.V. v. Superior Court*, 3 Cal.4th 459 (1992)).

1. Substantial Relationship and Reasonable Basis Tests

"In determining the enforceability of arm's-length contractual choice-of-law provisions, California courts shall apply the principles set forth in Restatement section 187, which reflects a strong policy favoring enforcement of such provisions." *Hambrecht & Quist Venture Partners v. Am. Med. Int'l, Inc.*, 38 Cal. App. 4th 1532, 1544 (1995) (quoting *Nedloyd*, 3 Cal. 4th at 464-65). According to these principles, the court must first determine whether the chosen state has a substantial relationship to the parties or their transaction, or whether there is any other reasonable basis for the parties' choice. *Nedloyd*, 3 Cal. 4th at 466 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187(2) (1971), [hereinafter Rest.]).

The incorporation of a party in the chosen state is sufficient to provide the required "substantial relationship," regardless of whether the party may have its principal place of business in another state. *Hambrecht*, 38 Cal. App.4th at 1546 (citing *Nedloyd*, 3 Cal.4th at 467). However, a corporate party's principal place of business is generally considered the corporation's place of domicile for choice-of-law purposes, under both California and New York law. *See Pacific Gas & Electric Co. v. State Bd. Of Equalization*, 134 Cal. App. 2d 149, 152-53 (1955) ("A corporation's residence is generally deemed to be where its principal place of business is"); *Elson v. Defren*, 726 N.Y.S. 2d 407, 413 (2001) (finding a Delaware corporation with principal place of business in New York to be a New York domiciliary for choice-of-law purposes). "[I]f one of the

contracting parties is incorporated [or domiciled] in the chosen state, then *all* of the contracting parties have a substantial relationship to that state for choice-of-law purposes." *Hambrecht,* 38 Cal.App.4th at 1546. In the absence of a substantial relationship, a party's residence in a chosen state is sufficient to meet the "reasonable basis" test. *Id.* at 1547 (citations omitted) ("If one of the parties reside in the chosen state, the parties have a reasonable basis for their choice.")

In the present case, Defendant's Partnership resides in and Plaintiff's principal place of business is located in New York.[1] Because a party's place of domicile arises from a corporate party's principal place of business or a non-corporate party's place of residence, these connections sufficiently create a substantial relationship to and a reasonable basis for choosing the laws of New York. Moreover, the place of payment under the Assumption Agreement is in New York. Given these facts, a relationship between the parties and the chosen state exists regardless of Defendant's residence in California or where the agreement was signed.[2] *See Hambrecht,* 38 Cal.App. 4th at 1546 (noting that "it is of no consequence that most of the plaintiffs in this case are residents or domiciliaries

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[1] The residence of the Partnership is relevant because the Assumption Agreement – the contract under which Plaintiff is seeking relief – is a contract between Defendant and her Partnership, not between Defendant and Plaintiff.

[2] Plaintiff alleges in its Complaint that "a substantial part of the events or omissions giving rise to the claim occurred in the [Central District of California]" (Compl. ¶4), and claims in its Opposition that the Agreement was signed in California. (Pla.'s Mem. Opp. at 6.) The Court accepts Plaintiff's later allegation but finds that it has no impact on the Court's decision.

of California or some state other than [the chosen state].") In *Hambrect*, the court noted that while information concerning California contacts may be relevant in deciding which state has the greater interest in having its statutes of limitations applied under a governmental interest analysis, it is irrelevant in assessing the validity of a choice-of-law provision. *Id.* (stating that under this latter analysis, "[a court asks] the simpler (and preliminary) question of whether the chosen state has a substantial relationship to the parties or transaction.") Accordingly, the parties have both a substantial relationship to New York and a reasonable basis for choosing the laws of that state to govern their agreement.

2. Existence of a Fundamental State Policy

If either the "substantial relationship" or the "reasonable basis" test is met, the court must then determine whether the chosen state's law is contrary to a *fundamental* policy of California. *Nedloyd*, 3 Cal. 4th at 466 (citing Rest. §187(2)).[3] If there is a conflict, the court must then

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[3] Section 187(2)(b) refers to the state " . . . which, under the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties." In a footnote, the court interprets section 187(2)(b) to mean the following:

> "[In the] occasional case in which California is the forum, and the parties have chosen the law of another state, but the law of a [*sic*] yet a third state, rather than California's, would apply absent the parties' choice[,] . . . a California court will look to the fundamental policy of the third state in determining whether to enforce the parties' choice of law."

Nedloyd, 3 Cal.4th at 467 n.5. Absent such a circumstance, however, the comparison is between the chosen state's law and California law. *See id.* and 466 (inserting "California" for the state " . . . which, under

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determine whether California has a "materially greater interest than the chosen state in the determination of the particular issue. . . ." *Id.* (concluding that if California has a materially greater interest than the chosen state, the choice-of-law provision will not be enforced for the "obvious reason" of declining to enforce a law contrary to the state's fundamental policies); *see also Hambrecht*, 38 Cal. App.4th at 1545 n.13 (finding that this analysis of determining the state with the greater interest in having its law applied to an issue is similar to, but different from, California's governmental interest approach). If, however, "there is no such conflict, the court shall enforce the parties' choice of law." *Nedloyd*, 3 Cal. 4th at 466.

The California and New York statutes of limitations governing breach of contractual obligation claims differ. California's statute of limitations for these claims is four years. CAL. CODE CIV. PROC. §337(1) (2003). Conversely, New York's statute of limitations is six years from the date that payment under the contract becomes due. N.Y. C.P.L.R. 213 (2003). Parties who choose to waive the statute of limitations altogether find authorization to do so in California Code of Civil Procedure section 360.5, which permits such waivers for a period of four years at a time so long as they are in writing, whereas New York General Obligations law section 17-103 prohibits such waivers prior to the accrual of the cause of action. *Compare* CAL. CODE CIV. PROC. §360.5 (2003), *with* N.Y. GEN. OBLIG. LAW § 17-103 (2003). Because Defendant attempted to waive the statute of limitations defense in the Assumption Agreement, the limitations period for an action on the

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the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.")

agreement is eight years in California and remains six years in New York.[4] (Pla.'s Mem. Opp. at 18.) Thus, the question becomes whether the application of New York's shorter statute of limitations would be contrary to a fundamental policy of California. *See Hambrecht,* 38 Cal. App.4th at 1545 n.13 ("the parties focus on whether the application of Delaware's[– the chosen state –]statutes of limitations would be contrary to a fundamental policy of California.")[5]

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[4] Defendant alleges that an "open-ended waiver of the statute of limitations" is impermissible under New York law and does not satisfy the California law governing waivers. (Def.'s Mem. Reply at 7.) However, in deciding a Motion to Dismiss, the Court construes the facts in the light most favorable to the Plaintiff. For purposes of this Motion, the Court finds that while the waiver is impermissible under New York law due to the fact that it was signed prior to the accrual of Plaintiff's cause of action, it is permissible under California law for the limited period of four years.

[5] In *Hambrecht,* the court noted the following in a footnote: "Because the choice-of-law clause states that Delaware law is to govern the construction of the . . . agreement, questions concerning the scope of the clause would, in the normal course, be decided under Delaware law." 38 Cal. App. 4th at 1540 n.5 (citing *Nedloyd,* 3 Cal. 4th at 469 n.7 ("[T]he question of whether [the choice-of-law] clause is ambiguous as to its scope . . . is a question of contract interpretation that in the normal course should be determined pursuant to Hong Kong [– the chosen state –] law.")). However, because the parties in both *Hambrecht* and *Nedloyd* failed to brief the "interpretation issue" under the chosen state's law, the courts held that "[t]he question therefore becomes one of California law." *Id.*

Plaintiff relies on this language to establish a rule that the scope of the choice-of-law provision is to be determined under the law of the chosen state (Pla.'s Mem. Opp. at 12), and uses that rule to claim that the present choice-of-law clause should be determined pursuant to New York law. Under New York precedent, courts follow the traditional approach to choice-of-law analyses and distinguish between procedural and substantive law. (Pla.'s Mem. Opp. at 14.) In doing so, New York courts apply New York statues [sic] of limitations to cases brought in a

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In general, "California courts accord contracting parties substantial freedom to modify the length of the statute of limitations." *Hambrecht,* 38 Cal.App.4th at 1548. Moreover, California courts have held that, "a standard choice-of-law provision (i.e., one which incorporates the 'law(s)' of a specified jurisdiction) includes the chosen state's statutes of limitations." *See id.* at 1541, 1548-49 ("discern[ing] no fundamental state policy against applying a foreign jurisdiction's statutes of limitations to claims brought within California courts."); *Ashland Chemical Co. v. Provence,* 129 Cal. App. 3d 790, 795 and n.2 (1982) (concluding that the shorter California statute of limitations applied to a tort case arising in Kentucky, but indicating in dicta that the choice-of-law provision would have required the application of Kentucky's statute of limitations had it been shorter than California's).[6] Thus,

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New York forum regardless of whether the forum follows the substantive law of a chosen state. *Id.* Plaintiff relies on this precedent to further formulate a rule that "under New York law, a designation of another state's laws by the parties to a contract is deemed *not* to include the other jurisdiction's statutes of limitation." (Pla.'s Mem. Opp. at 13-14.) Under this rule, Plaintiff attempts to persuade the Court that California should use its own statute of limitations as if it were a New York court sitting in New York. (Pla.'s Mem. Opp. at 17). Although clever, this inference is squarely in conflict with California precedent applying New York law, including New York statutes of limitation, and is therefore rejected. *See e.g., Aalmuhammed v. Lee,* 202 F.3d 1227, 1237 (9th Cir. 2000) (concluding that New York's longer statute of limitation should govern a case brought in California courts because New York has the stronger interest and would suffer more damage than California if its law were not applied).

[6] Plaintiff claims that *Ashland* stands for the proposition that even if there were sufficient contacts to the chosen state for choice-of-law purposes, those contacts are not necessarily sufficient to given [*sic*] the chosen state an interest in having its statute of limitations applied. *See Ashland,* 129 Cal. App. 3d at 795 (finding that while "Kentucky is the plaintiff's domicile, place of contracting, and the place of payment . . .

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California's policy regarding statutes of limitation is very relaxed. As one California court has stated, "If the parties to a contract can shorten [a] Californi[a] four-year limitations period to three *months*, we perceive no obstacle to applying a foreign state's three-*year* statute of limitations." *Hambrecht*, 38 Cal. App. 4th at 1549.

The primary policies behind California's statute of limitations are to protect California defendants from defending stale claims and California courts from processing those claims. *See Ashland*, 129 Cal. App. 3d at 794 ("Statutes of Limitation are designed to protect the enacting state's residents and courts from the burdens associated with the prosecution of stale cases. . . ."); *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482, 485 (9th Cir. 1987). As such, California has a lesser governmental interest in applying its own statute of limitations to California defendants when the limitation is longer than that of the chosen state. *Cf. Deutsche v. Turner Corp.*, 2003 WL 751576, at *12 (9th Cir. 2003) (citations omitted) ("California's interest in applying its own law is strongest when its statute of limitations is shorter than that of the

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these contacts . . . are irrelevant in determining whether Kentucky is substantially related to the transaction for the purpose of applying its statute of limitation . . . [b]ecause none of these contacts gives Kentucky an interest in having its statute of limitations applied.") In coming to this conclusion, the *Ashland* court relied largely on the fact that the chosen state's significantly longer statute of limitations-which more than tripled California's statute of limitations – conflicted with California's interest in avoiding the prosecution of stale claims. *See id.* The court also noted that the situation would be "markedly different" if Kentucky's limitation period were shorter than California's, in which case California's public policy would not be offended by applying Kentucky's statute of limitations. *Id.* at n.2. The Court rejects Plaintiff's interpretation of *Ashland* given this context.

foreign state, because a 'state has a substantial interest in preventing the prosecution in its courts of claims which it deems to be 'stale.'") In addition to these particular policies, California law generally "reflect[s] strong policy considerations favoring the enforcement of freely negotiated choice-of-law clauses." *Nedloyd*, 3 Cal. 4th at 462. The California Defendant here seeks refuge in these policies by attempting to enforce the choice-of-law provision that the parties contracted for, while Plaintiff seeks to turn the policies on their head in order to pursue a claim that is otherwise barred. Thus, California policy is furthered, rather than hindered, by interpreting the parties' choice-of-law provision to include New York's shorter statute of limitations.

Moreover, California lacks a materially greater interest than New York in the determination of the statutes of limitation issue. *Compare High Country Linens v. Block*, 2002 WL 1998272, at *3 (N.D. Cal. 2002) (citations omitted) (finding that "[t]he facts in [the] particular case favor enforcing California law as both parties' ties to California are more 'substantial, immediate and concrete' than to New York."), *with Aalmuhammed*, 202 F.3d at 1237 (concluding that "[b]ecause New York has the stronger interest and would suffer more damage than California if its law were not applied, New York's six-year statute of limitations governs.") Not only are the Partnership and the Plaintiff located in New York, but also the Assumption Agreement was entered into for the express benefit of a New York Plaintiff, and payments under the agreement were to occur in New York. Given these facts and the general California policy of allowing parties to modify – and in particular shorten – statutes of limitations, this Court finds that the present choice-of-law

provision is both enforceable and includes New York's six-year statute of limitations. Plaintiff's claims are thus barred by the applicable six-year statute of limitations. Accordingly, this Court does not reach the issue of joinder.

IV. Conclusion

For the reasons set forth above, the Court **hereby grants** Defendant's Motion to Dismiss (Docket #5 & #6). Plaintiff's sole claim for breach of contract is **hereby dismissed with prejudice.**

Dated: April 10, 2003

/s/ Florence-Marie Cooper
FLORENCE-MARIE
COOPER, JUDGE
UNITED STATES
DISTRICT COURT

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ABF CAPITAL CORP., a Delaware Corporation, **Plaintiff,** **vs.** **EDWARD J. OSLEY, J R.,** **Defendant.**	**CV 02-9909 FMC (AJWx)** **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS** (Entered Apr. 11, 2003)

This matter is before the Court on the Defendant's Motion to Dismiss (Docket #10 & #11). The Court deems this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing date set for April 21, 2003, is removed from the Court's calendar. For the reasons and in the manner set forth below, the Court hereby grants Defendant's Motion to Dismiss.

I. Background

In December of 1982, Defendant, a Utah citizen, purchased six (6) units of limited partnership interest in Oak Energy Partners, a New York limited partnership in the business of acquiring, drilling, developing and operating oil and gas property in Texas and Oklahoma. The Partnership then entered into several Sublease Agreements with Plaintiff. Under the Sublease Agreements, the Partnership agreed to pay Plaintiff a minimum annual royalty, but also agreed that payment could be deferred,

subject to each partner's assumption of liabilities. Defendant executed an Assumption of Liabilities Agreement ("Assumption Agreement") for the express benefit of Plaintiff (Compl. at 3), agreeing to assume personal liability for his pro rata share of the royalties. The Partnership elected to defer the minimum annual royalties. Defendant's share of the royalties then became due and payable on or about January 2, 1995.[1] Paragraph 7 of the Assumption Agreement states that "[Defendant] waives the benefit of the statute of limitations affecting his liability hereunder or the enforcement thereof . . . ," and paragraph 10 provides, "[this] Agreement is governed by and construed under the laws of the State of New York." (Compl. Ex. A ¶¶7, 10.) Plaintiff filed suit on December 30, 2002. On March 17, 2003, Defendant filed a motion to dismiss the action for failure to state a claim, pursuant to Fed. R. Civ. Proc. 12(b)(6). The Court is persuaded by Defendant's argument that the Court should apply the New York six-year statute of limitations for these claims. In doing so, the Court concludes that the statute of limitations has expired by approximately one year, and therefore Plaintiff's breach of Contract claim is dismissed with prejudice.

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[1] Plaintiff acknowledges that the date of accrual was December 31, 1994 (Pla.'s Mem. Opp. at 2), but then later makes the argument that the action did not accrue until Monday, January 2, 1995, subject to Cal. Civ. Code section 11 because December 31 was a Saturday. (Pla.'s Mem. Opp. at 18 n.7.) Under either date of accrual, the present action remains barred under the applicable six-year statute of limitations.

II. Dismissal Pursuant to Rule 12(b)(6)

The current Motion requires the Court to determine whether the Complaint states a claim upon which relief may be granted. *See* Fed R. Civ. P. 12(b)(6). The Court will not dismiss Plaintiff's claims for relief unless it cannot prove any set of facts in support of its breach of contract claim that would entitle it to relief. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998). In limiting its inquiry to the content of the Complaint, the Court must take the allegations of material fact as true and construe them in the light most favorable to the plaintiff. *See W. Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985). Additionally, the Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994).

III. Applicability of New York Statute of Limitations

A. Enforceability of the Choice-of-Law Provision

Generally, a district court in a diversity case must apply the same choice-of-law analysis that would be applied by state courts in the jurisdiction in which the district court is situated. *See Cleary v. News Corp.*, 30 F.3d 1255, 1265 (9th Cir. 1994) (*citing Klaxon Co. v. Stentor Elect. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Waggoner v. Snow, Becker, Kroll, Klaris & Kruass*, 991 F.2d 1501, 1506 (9th Cir. 1993)). In the absence of a contract designating the applicable governing law, California courts apply the "governmental interest" test, focusing on the governmental interest of

each state involved in the litigation. *Brentwood Investors v. Wal-Mart Stores, Inc.*, 1998 WL 337968, at *7 (N.D. Cal. 1998), *aff'd*, 225 F.3d 661 (9th Cir. 2000) (citations omitted) (stating that under the governmental interest [*sic*], California law is applied unless (1) the foreign law conflicts with California law, (2) both jurisdictions have significant interests in having their law applied, and (3) the foreign jurisdiction's policy interests would be more impaired if its laws were not applied); *Hurtado v. Superior Court*, 11 Cal. 3d 574 (1974). Conversely, if a contract contains a choice-of-law provision, that provision controls under California law. *Brentwood Investors*, 1998 WL 337968, at *7 (citing *Nedloyd Lines, B. V. v. Superior Court*, 3 Cal. 4th 459 (1992)).

1. Substantial Relationship and Reasonable Basis Tests

"In determining the enforceability of arm's-length contractual choice-of-law provisions, California courts shall apply the principles set forth in Restatement section 187, which reflects a strong policy favoring enforcement of such provisions." *Hambrecht & Quist Venture Partners v. Am. Med. Intl, Inc.*, 38 Cal. App. 4th 1532, 1544 (1995) (quoting *Nedloyd*, 3 Cal. 4th at 464-65). According to these principles, the court must first determine whether the chosen state has a substantial relationship to the parties or their transaction, or whether there is any other reasonable basis for the parties' choice. *Nedloyd*, 3 Cal. 4th at 466 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187(2) (1971), [hereinafter Rest.]).

The incorporation of a party in the chosen state is sufficient to provide the required "substantial relationship," regardless of whether the party may have its principal place

of business in another state. *Hambrecht*, 38 Cal.App.4th at 1546 (citing *Nedloyd*, 3 Cal.4th at 467). However, a corporate party's principal place of business is generally considered the corporation's place of domicile for choice-of-law purposes, under both California and New York law. *See Pacific Gas & Electric Co. v. State Bd. Of Equalization*, 134 Cal. App. 2d 149, 152-53 (1955) ("A corporation's residence is generally deemed to be where its principal place of business is"); *Elson v. Defren*, 726 N.Y.S. 2d 407, 413 (2001) (finding a Delaware corporation with principal place of business in New York to be a New York domiciliary for choice-of-law purposes). "[I]f one of the contracting parties is incorporated [or domiciled] in the chosen state, then *all* of the contracting parties have a substantial relationship to that state for choice-of-law purposes." *Hambrecht*, 38 Cal. App. 4th at 1546. In the absence of a substantial relationship, a party's residence in a chosen state is sufficient to meet the "reasonable basis" test. *Id.* at 1547 (citations omitted) ("If one of the parties reside in the chosen state, the parties have a reasonable basis for their choice.")

In the present case, Defendant's Partnership resides in and Plaintiff's principal place of business is located in New York.[3] Because a party's place of domicile arises from a corporate party's principal place of business or a non-corporate party's place of residence, these connections sufficiently create a substantial relationship to and a reasonable basis for choosing the laws of New York, Moreover, the place of payment under the Assumption Agreement is in New York. Given these facts, a relationship between the

[3] The residence of the Partnership is relevant because the Assumption Agreement – the contract under which Plaintiff is seeking relief – is a contract between Defendant and his Partnership, not between Defendant and Plaintiff.

parties and the chosen state exists regardless of where the agreement was signed.[3] *See Hambrecht*, 38 Cal. App. 4th at 1546 (noting that "it is of no consequence that most of the plaintiffs in this case are residents or domiciliaries of . . . some state other than [the chosen state].") In *Hambrecht*, the court noted that while information concerning California contacts may be relevant in deciding which state has the greater interest in having its statutes of limitations applied under a governmental interest analysis, it is irrelevant in assessing the validity of a choice-of-law provision. *Id.* (stating that under this latter analysis, "[a court asks] the simpler (and preliminary) question of whether the chosen state has a substantial relationship to the parties or transaction.") Accordingly, the parties have both a substantial relationship to New York and a reasonable basis for choosing the laws of that state to govern their agreement.

2. Existence of a Fundamental State Policy

If either the "substantial relationship" or the "reasonable basis" test is met, the court must then determine whether the chosen state's law is contrary to a *fundamental* policy of California. *Nedloyd*, 3 Cal. 4th at 466 (citing Rest. §187(2)).[4] If there is a conflict, the court must then

[3] Plaintiff alleges in its Complaint that "a substantial part of the events or omissions giving rise to the claim occurred in the [Central District of California]" (Compl. ¶4), and claims in its Opposition that the Agreement was signed in California. (Pla.'s Mem. Opp. at 6.) The Court accepts Plaintiff's later allegation but finds that it has no impact on the Court's decision.

[4] Section 187(2)(b) refers to the state " . . . which, under the rule of § 188, would be the state of the applicable law in the absence of an

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determine whether California has a "materially greater interest than the chosen state in the determination of the particular issue. . . . " *Id.* (concluding that if California has a materially greater interest than the chosen state, the choice-of-law provision will not be enforced for the "obvious reason" of declining to enforce a law contrary to the state's fundamental policies); *see also Hambrecht*, 38 Cal. App. 4th at 1545 n.13 (finding that this analysis of determining the state with the greater interest in having its law applied to an issue is similar to, but different from, California's governmental interest approach). If, however, "there is no such conflict, the court shall enforce the parties' choice of law," *Nedloyd*, 3 Cal. 4th at 466.

The California and New York statutes of limitations governing breach of contractual obligation claims differ. California's statute of limitations for these claims is four years. CAL. CODE CIV. PROC. §337(1) (2003). Conversely, New York's statute of limitations is six years from the date that payment under the contract becomes due. N.Y. C.P.L.R. 213 (2003). Parties who choose to waive the statute of limitations altogether find authorization to do so

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effective choice of law by the parties." In a footnote, the court interprets section 187(2)(b) to mean the following:

> "[In the] occasional case in which California is the forum, and the parties have chosen the law of another state, but the law of a [sic] yet a third state, rather than California's, would apply absent the parties' choice[,] . . . a California court will look to the fundamental policy of the third state in determining whether to enforce the parties' choice of law."

Nedloyd, 3 Cal. 4th at 467 n.5. Absent such a circumstance, however, the comparison is between the chosen state's law and California law. *See id.* and 466 (inserting "California" for the state " . . . which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.")

in California Code of Civil Procedure section 360.5, which permits such waivers for a period of four years at a time so long as they are in writing, whereas New York General Obligations law section 17-103 prohibits such waivers prior to the accrual of the cause of action. *Compare* CAL. CODE CIV. PROC. §360.5 (2003), *with* N.Y. GEN. OBLIG. LAW §17-103 (2003). Because Defendant attempted to waive the statute of limitations defense in the Assumption Agreement, the limitations period for an action on the agreement is eight years in California and remains six years in New York.[5] (Pla.'s Mem. Opp. at 18.) Thus, the question becomes whether the application of New York's shorter statute of limitations would be contrary to a fundamental policy of California. *See Hambrecht*, 38 Cal.App.4th at 1545 n.13 ("the parties focus on whether the application of Delaware's[– the chosen state –]statutes of limitations would be contrary to a fundamental policy of California.")[6]

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[5] For purposes of this Motion, the Court finds that while the waiver is impermissible under New York law due to the fact that it was signed prior to the accrual of Plaintiff's cause of action, it is permissible under California law for the limited period of four years.

[6] In *Hambrecht*, the court noted the following in a footnote: "Because the choice-of-law clause states that Delaware law is to govern the construction of the . . . agreement, questions concerning the scope of the clause would, in the normal course, be decided under Delaware law." 38 Cal. App. 4th at 1540 n.5 (citing *Nedloyd*, 3 Cal. 4th at 469 n.7 ("[T]he question of whether [the choice-of-law] clause is ambiguous as to its scope . . . is a question of contract interpretation that in the normal course should be determined pursuant to Hong Kong [– the chosen state –] law.")). However, because the parties in both *Hambrecht* and *Nedloyd* failed to brief the "interpretation issue" under the chosen state's law, the courts held that "[t]he question therefore becomes one of California law." *Id.*

Plaintiff relies on this language to establish a rule that the scope of the choice-of-law provision is to be determined under the law of the chosen state (Pla.'s Mem. Opp. at 12), and uses that rule to claim that the present choice-of-law clause should be determined pursuant to New

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In general, "California courts accord contracting parties substantial freedom to modify the length of the statute of limitations." *Hambrecht*, 38 Cal.App.4th at 1548. Moreover, California courts have held that, "a standard choice-of-law provision (i.e., one which incorporates the 'law(s)' of a specified jurisdiction) includes the chosen state's statutes of limitations." *See id.* at 1541, 1548-49 ("discern[ing] no fundamental state policy against applying a foreign jurisdiction's statutes of limitations to claims brought within California courts."); *Ashland Chemical Co. v. Provence*, 129 Cal. App. 3d 790, 795 and n.2 (1982) (concluding that the shorter California statute of limitations applied to a tort case arising in Kentucky, but indicating in dicta that the choice-of-law provision would have required the application of Kentucky's statute

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York law. Under New York precedent, courts follow the traditional approach to choice-of-law analyses and distinguish between procedural and substantive law. (Pla.'s Mem. Opp. at 13-14.) In doing so, New York courts apply New York statues [sic] of limitations to cases brought in a New York forum regardless of whether the forum follows the substantive law of a chosen state. *Id.* Plaintiff relies on this precedent to further formulate a rule that "under New York law, a designation of another state's laws by the parties to a contract is deemed *not* to include the other jurisdiction's statutes of limitation." (Pla.'s Mem. Opp. at 14-15.) Under this rule, Plaintiff attempts to persuade the Court that California should use its own statute of limitations as if it were a New York court sitting in New York. (Pla.'s Mem. Opp. at 17). Although clever, this inference is squarely in conflict with California precedent applying New York law, including New York statutes of limitation, and is therefore rejected. *See e.g., Aalmuhammed v. Lee*, 202 F.3d 1227, 1237 (9th Cir. 2000) (concluding that New York's longer statute of limitation should govern a case brought in California courts because New York has the stronger interest and would suffer more damage than California if its law were not applied).

of limitations had it been shorter than California's).[7] Thus, California's policy regarding statutes of limitation is very relaxed. As one California court has stated, "If the parties to a contract can shorten [a] Californi[a] four-year limitations period to three *months*, we perceive no obstacle to applying a foreign state's three-*year* statute of limitations." *Hambrecht*, 38 Cal. App. 4th at 1549.

The primary policies behind California's statute of limitations are to protect California defendants from defending stale claims and California courts from processing those claims. *See Ashland*, 129 Cal. App. 3d at 794 ("Statutes of limitation are designed to protect the enacting state's residents and courts from the burdens associated with the prosecution of stale cases. . . ."); *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482, 485 (9th Cir. 1987). As such, California has a lesser governmental

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[7] Plaintiff claims that *Ashland* stands for the proposition that even if there were sufficient contacts to the chosen state for choice-of-law purposes, those contacts are not necessarily sufficient to given [*sic*] the chosen state an interest in having its statute of limitations applied. (Pla.'s Mem. Opp. at 5 (quoting *Ashland*, 129 Cal. App. 3d at 795 (finding that while "Kentucky is the plaintiff's domicile, place of contracting, and the place of payment . . . these contacts . . . are irrelevant in determining whether Kentucky is substantially related to the transaction for the purpose of applying its statute of limitation . . . [b]ecause none of these contacts gives Kentucky an interest in having its statute of limitations applied."))) In coming to this conclusion, the *Ashland* court relied largely on the fact that the chosen state's significantly longer statute of limitations – which more than tripled California's statute of limitations – conflicted with California's interest in avoiding the prosecution of stale claims. *See id.* The court also noted that the situation would be "markedly different" if Kentucky's limitation period were shorter than California's, in which case California's public policy would not be offended by applying Kentucky's statute of limitations. *Id* at n.2. The Court rejects Plaintiff's interpretation of *Ashland* given this context.

interest in applying its own statute of limitations to California defendants when the limitation is longer than that of the chosen state. *Cf. Deutsche v. Turner Corp.*, 2003 WL 751576, at *12 (9th Cir. 2003) (citations omitted) ("California's interest in applying its own law is strongest when its statute of limitations is shorter than that of the foreign state, because a 'state has a substantial interest in preventing the prosecution in its courts of claims which it deems to be 'stale.'") In addition to these particular policies, California law generally "reflect[s] strong policy considerations favoring the enforcement of freely negotiated choice-of-law clauses." *Nedloyd*, 3 Cal. 4th at 462. By attempting to prevent enforcement of the choice-of-law provision that the parties have contracted for, Plaintiff seeks to turn these policies on their heads in order to pursue a claim that is otherwise barred. Thus, California policy is furthered, rather than hindered, by interpreting the parties' choice-of-law provision to include New York's shorter statute of limitations.

Moreover, California lacks a materially greater interest than New York in the determination of the statutes of limitation issue. *Compare High Country Linens v. Block*, 2002 WL 1998272, at *3 (N.D. Cal. 2002) (citations omitted) (finding that "[t]he facts in [the] particular case favor enforcing California law as both parties' ties to California are more 'substantial, immediate and concrete' than to New York."), *with Aalmuhammed*, 202 F.3d at 1237 (concluding that "[b]ecause New York has the stronger interest and would suffer more damage than California if its law were not applied, New York's six-year statute of limitations governs.") Not only are the Partnership and the Plaintiff located in New York, but also the Assumption Agreement was entered into for the express

benefit of a New York Plaintiff, and payments under the agreement were to occur in New York. California's interest is even more minimal because the present case involves neither a California defendant nor a California Plaintiff.[8] Given these facts and the general California policy of allowing parties to modify – and in particular shorten – statutes of limitations, this Court finds that the present choice-of-law provision is both enforceable and includes New York's six-year statute of limitations. Plaintiff's claim is thus barred by the applicable six-year statute of limitations.

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[8] Plaintiff alleges that "Defendant is now a nonresident of the State of California" in an attempt to toll the statute of limitations during the period of Defendant's absence from the state pursuant to a California tolling statute. (Pla.'s Mem. Opp. at 18 n.7 (citing CAL. CODE CIV. PROC. §351 (2003) ("If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.")))

Although, section 351 applies to nonresidents who were not in the state at the time of a cause of action's accrual, the validity of its application to a particular statute of limitations depends on whether the parties are engaged in interstate commerce. *Compare Abramson v. Brownstein*, 897 F.2d 389, 391-92 (9th Cir. 1990) (finding that section 351 imposes an unconstitutional burden on nonresidential individuals engaged in interstate commerce by forcing them to choose between being present in California for several years or forfeiting the limitations defense), *with Pratali v. Gates*, 4 Cal. App. 4th 632, 633-34 (1992) (concluding that applying section 351 to noncommercial defendants not engaged in interstate commerce does not violate the commerce clause). The Court finds that in the present case, Defendant is a non-California resident whose relationship to Plaintiff arises from an interstate commerce contractual agreement between the Partnership and Plaintiff. Since tolling the statute of limitations in this case would unconstitutionally violate the commerce clause, the Court denies [*sic*] to do so and applies New York law in its entirety.

IV. Conclusion

For the reasons set forth above, the Court **hereby grants** Defendant's Motion to Dismiss (Docket #9 & #11). Plaintiff's sole claim for breach of contract is **hereby dismissed with prejudice.**

IT IS SO ORDERED.

Dated: April 10, 2003

/s/ Florence Marie Cooper
FLORENCE-MARIE COOPER,
JUDGE
UNITED STATES DISTRICT
COURT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CIVIL MINUTES – GENERAL

Case No. CV 02-9908 FMC (AJWx) Date: May 15, 2003

Title: ABF CAPITAL CORP. v RENEE PETERS

PRESENT:

THE HONORABLE FLORENCE-MARIE COOPER, JUDGE

Alicia Mamer	Not present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Not present	Not present

PROCEEDINGS: ORDER DENYING MOTION (In Chambers)

This matter is before the Court on Plaintiff's Motion to Amend or Alter Judgment (docket #17). Because no judgment has been entered in this action, the Court construes Plaintiff's Motion as one for reconsideration of the Court's Order Granting Defendant's Motion to Dismiss.

Local Rule 7-18 limits the grounds upon which a party may seek reconsideration of the court's decision on a given motion. Under Local Rule 7-18, a Motion for reconsideration is proper only where the moving party demonstrates: 1) there is a material difference in fact or law from that previously presented to the Court that in the exercise of

reasonable diligence could not have been known to the party at the time of such decision; 2) the emergence of new material facts or a change in law occurring after the Court has rendered its decision; or 3) a manifest showing of a failure to consider material facts presented to the Court. None of these grounds is present here.

Defendant is correct that Plaintiff is merely re-arguing its opposition to the Motion to Dismiss, which was rejected by the Court. As explained at length in the Court's April 10, 2003, Order, California's choice-of-law analysis includes the chosen state's statute of limitation. See Hambrecht & Quist Venture Partners v. American Medical Int'l, Inc., 38 Cal. App. 4th 1532 (1995). Despite Plaintiff's argument to the contrary, Aalmuhammed v. Lee, 202 F.3d 1227, 1237 (9th Cir. 2000), supports this general proposition, notwithstanding the fact that Aalmuhammed did not involve a contractual choice-of-law provision.

The Court construes Plaintiff's Motion to Amend or Alter Judgment as a Motion for Reconsideration. The Motion for Reconsideration is procedurally improper because it is not based on new facts, new law, or the failure of the Court to consider material facts; the Motion is therefore **DENIED**. Additionally, the Motion for Reconsideration does nothing more than advance arguments already raised by Plaintiff in its Opposition, and already rejected by the Court; accordingly, the Motion is **DENIED** on its merits as well.

Initials of Deputy Clerk AM

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CIVIL MINUTES – GENERAL

Case No. CV 02-9908 FMC (AJWx) Date: May 15, 2003

Title: ABF CAPITAL CORPORATION v EDWARD J. OSLEY, JR.

PRESENT:

THE HONORABLE FLORENCE-MARIE COOPER, JUDGE

Alicia Mamer	Not present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Not present	Not present

PROCEEDINGS: ORDER DENYING MOTION (In Chambers)

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1) there is a material difference in fact or law from that previously presented to the Court that in the exercise of reasonable diligence could not have been known to the party at the time of such decision; 2) the emergence of new material facts or a change in law occurring after the Court has rendered its decision; or 3) a manifest showing of a failure to consider material facts presented to the Court. None of these grounds is present here.

Defendant is correct that Plaintiff is merely re-arguing its opposition to the Motion to Dismiss, which was rejected by the Court. As explained at length in the Court's April 10, 2003, Order, California's choice-of-law analysis includes the chosen estate's statute of limitation. See Hambrecht & Quist Venture Partners v. American Medical Int'l, Inc., 38 Cal. App. 4th 1532 (1995). Despite Plaintiff's argument to the contrary, Aalmuhammed v. Lee, 202 F.3d 1227, 1237 (9th Cir. 2000), supports this general proposition, notwithstanding the fact that Aalmuhammed did not involve a contractual choice-of-law provision.

Plaintiff also attempts to reargue its tolling argument, based on Cal. Code Civ. Pro. § 351, based on new evidence that the Defendant is (or was) a California resident. However, Plaintiff's argument is unpersuasive. First, there is no indication that the new evidence was only recently obtained by plaintiff; therefore, this argument is procedurally barred. In any event, the fact that Defendant is (or was) a California resident only strengthens the rationale for applying the New York statute of limitations. See Deutsch v. Turner Corp., 324 F.3d 692, 716-17 (9th Cir. 2003) (California has little interest in applying its own statute of limitations to claims asserted against its residents when the competing jurisdiction's limitations period is shorter)

The Court construes Plaintiff's Motion to Amend or Alter Judgment as a Motion for Reconsideration. The Motion for Reconsideration is procedurally improper because it is not based on new facts, new law, or the failure of the Court to consider material facts; the Motion is therefore **DENIED**. Additionally, the Motion for Reconsideration does nothing more than advance arguments already raised by Plaintiff in its Opposition, and already rejected by the Court; accordingly, the Motion is **DENIED** on its merits as well.

Initials of Deputy Clerk AM

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ABF CAPITAL CORP., Plaintiff-Appellant, v. EDWARD OSLEY Defendant-Appellee.	No. 03-56349 D.C. No.: CV-02-09909-FMC ORDER

ABF CAPITAL CORP., Plaintiff-Appellant, v. RENEE PETERS Defendant-Appellee.	No. 03-56352 D.C. No.: CV-02-09908-FMC ORDER

(Filed Aug. 12, 2005)

Before: NELSON and BERZON, Circuit Judges, and MAHAN,* District Judge.

The appellant's petition for rehearing, filed on August 2, 2005, is hereby DENIED.

* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.